Supreme Court, U. S.
FILED
JUL 12 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-58

THOMAS J. GILLEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

J. SHANE CREAMER, ESQUIRE
PETER GOLDBERGER, ESQUIRE
CARROLL CREAMER CARROLL
& DUFFY
326 Three Penn Center Plaza
Philadelphia, PA 19102
Attorneys for Petitioner
(215) 568-5200

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

Page

OPINIONS BELOW 2

JURISDICTION 2

QUESTIONS PRESENTED 2

STATUTE INVOLVED 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 8

1. THE DECISION OF THE THIRD CIRCUIT PANEL MAJORITY CANNOT BE RECONCILED WITH THIS COURT'S 1978 DECISION IN "UNITED STATES V. UNITED STATES GYPSUM CO." 8

   a. "Gypsum" 's intent holding applies to all price-fixing cases. 9

   b. A conclusive presumption of intent in per se price-fixing criminal cases is unconstitutional. 13

2. THE FEDERAL CIRCUITS ARE DIVIDED ON THE APPLICATION OF THIS COURT'S "GYPSUM" HOLDING TO PRICE-FIXING CASES WHICH DO NOT FOCUS ON A "CONTROLLING CIRCUMSTANCE" DEFENSE. 14

3. THE REASONING OF THE CONCURRING JUDGE BELOW CANNOT SUPPORT THE JUDGMENT, AS IT IS INCONSISTENT WITH THIS COURT'S DECISIONS ON WHETHER AN UNCONSTITUTIONAL INSTRUCTION ON AN ELEMENT OF THE OFFENSE CAN CONSTITUTE HARMLESS ERROR. 15

4. THIS CASE PRESENTS THE IMPORTANT AND RECURRING ISSUE ARISING OUT OF THIS COURT'S 1962 "WISE" DECISION WHETHER A CORPORATE PRESIDENT'S MERE KNOWLEDGE OF AND FAILURE TO PREVENT HIS SUBORDINATE'S ANTITRUST VIOLATIONS SUBJECT THAT PRESIDENT TO PERSONAL CRIMINAL LIABILITY. 17

CONCLUSION 19

APPENDIX A (Court of Appeals decision).....1a

APPENDIX B (District Court opinion) 1b

APPENDIX C (Order denying rehearing) 1c

APPENDIX D (Order staying mandate) 1d

TABLE OF AUTHORITIES

Cases: *Page*

Addyston Pipe & Steel Co. v. United States,
175 U.S. 211 (1899) 12

Bollenbach v. United States,
326 U.S. 607 (1946) 16

Brady v. School Board,
416 U.S. 696 (1974) 9

Dennis v. United States,
341 U.S. 494 (1951) 10

Dunn v. United States,
___ U.S. ___ (June 4, 1979) 13

Hamling v. United States,
418 U.S. 87 (1974) 9

Henderson v. Kibbe,
431 U.S. 145 (1977) 16

Jackson v. Virginia,
___ U.S. ___ (June 28, 1979) 9

Local 189, Amalgamated Meat Cutters v.
Jewel Tea Co., 381 U.S. 676 (1965) 18

Morissette v. United States,
342 U.S. 246 (1952) 13

Mullaney v. Wilbur,
421 U.S. 684 (1975) 14

Patterson v. New York
432 U.S. 197 (1977) 14

Pipefitters Local 562 v. United States,
407 U.S. 385 (1972) 15

Sandstrom v. Montana,
___ U.S. ___ (June 18, 1979) 13-14,16

Screws v. United States,
325 U.S. 91 (1945) 15

Page

Terminiello v. Chicago,
337 U.S. 1 (1947) 15

United Bhd. of Carpenters v. United States,
330 U.S. 395 (1947) 16

United States v. Brighton Building & Maintenance
Co., ___ F.2d ___ (7th Cir., May 18, 1979) 14

United States v. Bryant,
461 F.2d 912 (6th Cir. 1972) 16

United States v. Foley,
___ F.2d ___ (4th Cir., April 19, 1979) 14

United States v. Gillen,
458 F. Supp. 887 (M.D.Pa. 1978) 5

United States v. Griffith,
334 U.S. 100 (1948) 8,12

United States v. Howard,
506 F.2d 1131 (2d Cir. 1974) 16

United States v. Patten,
226 U.S. 525 (1913) 8,11,12

United States v. Reading Co.,
226 U.S. 324 (1912) 12

United States v. Socony-Vacuum Oil Co.,
310 U.S. 150 (1940) 8,11

United States v. Standard Oil Co.,
316 F.2d 884 (7th Cir. 1963) 18

United States v. United States Gypsum Co.,
438 U.S. 422 (1978) ..... *passim*

United States v. Wise,
370 U.S. 405 (1962) 17

Statute and Rule

15 U.S.C. §1 (1970 ed.) 3,9,17

Fed.R.Crim.P. 52(b) 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No.

THOMAS J. GILLEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Thomas J. Gillen respectfully petitions this Court to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on May 8, 1979.

OPINIONS BELOW

The opinion of the court of appeals is not yet published. A copy of the court's opinion is attached as Appendix A. By order dated June 12, 1979, the court of appeals denied a petition for rehearing. Appx. C. The opinion of the trial court, including its findings of fact, is published at 458 F.Supp. 887 (M.D.Pa. 1978). Appx. B. On June 22, 1979, the court of appeals stayed its mandate until July 12, 1979, pending filing of this Petition. Appx. D.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit entered May 8, 1979. A timely petition for rehearing was denied on June 12, 1979. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. May this Court's ruling in *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), that intent is an element of a criminal antitrust conspiracy charge be held inapplicable to this price-fixing case on the ground that it, unlike *Gypsum*, involves only *per se* conduct?
2. May the intent element in a criminal price-fixing case be conclusively presumed by the judge sitting as factfinder in a non-jury trial?
3. Was the conclusive presumption of the intent element in this criminal price-fixing case both plain and prejudicial error?
4. May the president of a corporation who, at most, knew of and failed to prevent his subordinate's criminal price-fixing activity be held criminally responsible without proof of actual participation in the offense by authorizing, ordering or otherwise helping to perpetrate it?

STATUTE INVOLVED

Title 15, U.S. Code, §1 (1970 ed.):

> Every contact, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce along the several States, or with foreign nations, is declared to be illegal . . . . Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

STATEMENT OF THE CASE

Petitioner, Thomas J. Gillen, and another were charged in a one-count misdemeanor indictment with conspiring to fix the "circular" prices of anthracite coal in violation of 15 U.S.C. §1 (1970 ed.). (The indictment concerned only conduct antedating the 1974 Antitrust Improvements Act, which, *inter alia*, made price-fixing a felony.) Of six corporate and five individual defen-

dants charged in this and a related case, petitioner was the only one to assert his innocence. After a five-day, non-jury trial in the Middle District of Pennsylvania, Judge R. Dixon Herman filed a Memorandum and Verdict, dated June 21, 1978, finding him guilty. Appx. B. Execution of a six month suspended sentence, two years' probation with a special condition of community service, and a $35,000 fine has been stayed pending appeal.

Petitioner was part owner of Blue Coal Corp. of Ashley, Pennsylvania, from 1966 through 1973 and was president and chief executive officer of the company from 1968 through 1973. As such, he had overall authority over all departments of the company, which was in the business of mining and selling anthracite coal.

> From 1961 through November, 1973, the Anthracite Producers Adivsory Board, composed of representatives of the major anthracite organizations, met monthly to consider and recommend the total anthracite production quota as provided in the federally authorized Production Control Plan for the Anthracite Industry. Four or five times a year, after adjournment of the Advisory Board meetings, the same company representatives who constituted the Advisory Board would discuss and reach tentative agreements on the prices each represented company would charge for the various sizes of coal for the ensuing months. In addition, agreements were reached at these so-called "after meetings" on the timing of the price change as well as the company to initiate the change. After the tentative agreement was reached, the representatives would report to their superiors for their approval. When approved, as they generally were, anthracite price circulars were issued by the companies. These circulars which were issued three or four times a year were price lists for the sale of coal to line dealers. These line dealers were dealers who were not located in the immediate vicinity of the colliery and who generally received coal shipments by rail or truck.

United States v. Gillen, (3rd Cir.), Appx. A, at 2-3 (footnotes omitted). At trial, petitioner did not dispute that these "after meetings" constituted a conspiracy in violation of the Sherman Act. Rather, the issue was petitioner's knowledge of and participation in this conspiracy. Carl Tomaine, the chief prosecution witness, was Blue Coal's vice president in charge of domestic and retail sales from 1968 through 1973. The trial court found that Tomaine "generally . . . reported what occurred at these meetings to his superior," the petitioner. Appx. B, 458 F.Supp. at 889. The trial court also found that petitioner "knew and approved of the actions of Tomaine in the agreements reached at these meetings." *Id.* As a "strong indication" of petitioner's knowing participation in the conspiracy, the trial judge relied on testimony of Tomaine that "whenever [petitioner] was available he discussed these meetings with him telling him of the proposed price increases or decreases of all the companies," and that petitioner "would say 'do whatever you think is right[']' or shrug his shoulders . . . ." *Id.* , 458 F.Supp. at 894.

In his defense, petitioner established that there was a sharp dichotomy in the anthracite industry between "production men" and "sales men." Petitioner contended that throughout his lifetime in the coal business, beginning as a laborer shoveling coal in underground mines, then as a miner, and culmininating as President

and part owner of Blue Coal, he was always in production, not sales. No witness from the competitor companies could recall ever having discussed coal prices with petitioner. The only pricing decision the Government could attribute to petitioner was his decision to pass on to consumers the added costs of the new federal Black Lung legislation, an entirely different kind of decision than that involved in the conspiracy.

On appeal, a panel of the United States Court of Appeals for the Third Circuit affirmed, while dividing on rationale. The initial holding of the panel majority is that "in price-fixing conspiracies, where the conduct is illegal per se, no inquiry has to be made on the issue of intent beyond proof that one joined or formed the conspiracy." Appx. A, slip op. at 8. This conclusion is premised on the inference "that the Court did not intend any extraordinary change in the rules of law on price-fixing cases," *id.* at 7, by its decision in *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), which the panel majority considered a "rule of reason," rather that a "*per se*" case. As an alternate basis for its decision, the panel held:

> Moreover, even if read to apply here, *Gypsum* does not require a reversal because the intent requirements will always be met in a case involving a price-fixing conspiracy. If a defendant intends to fix prices, he necessarily intends to restrain trade. . . . Here, where their actions were nothing less than price-fixing, the violators cannot be heard to argue that they did not know that their meetings and discussions of prices would result in an unreasonable restraint of trade.
>
> Additionally, the mere existence of a price-fixing agreement establishes a defendant's illegal purpose. . . . Thus, the conscious object of every price-fixing conspiracy is an illegal act.

Appx. A, slip op. at 9. Judge Arlin Adams concurred in the judgment on different grounds. He contended that the District Court erred in holding that intent is not an element in a criminal price-fixing case, but that the error was neither plain nor harmful. *Id.* at 14-19.

Finally, the Court of Appeals rejected petitioner's challenge to the sufficiency of the evidence. The panel pointed to four factual findings in support of the verdict: (a) Vice president Tomaine kept petitioner abreast of pricing "whenever he was available." Appx. A, slip op. at 10 & n. 8. (b) The vice president specifically told petitioner that at certain meetings the participants "agreed to go along on certain prices." *Id.* at 11 & n. 9. (c) One witness said that "in a social atmosphere . . . som one would make the statement that it's about time that the boys get together and start thinking about the circular. This was . . . mentioned by Mr. Tedesco, Mr. Ulmer, Mr. Gillen and myself." *Id.* at 11. (d) Petitioner, in 1966 or 1967, prior to the time that he even knew of the "after meetings" (*see* Finding #6, Appx. B, 458 F.Supp. at 889) attended a meeting about prices and criticized price-cutting. Slip op. at 11-12 & n. 10. Ultimately, however, the panel seemed to recognize affirmance of this conviction depended upon the theory that:

> as president of the company, Gillen was in a position to order the price-fixing halted, but did not do so. When a company president has knowledge . . . , he may not insulate himself from liability by leaving the actual execution of the

> scheme to his subordinates. . . . If this were not the rule, the highest corporate officers would, in effect, be beyond the reach of the antitrust laws . . . .

Id. at 12. Rehearing and rehearing in banc were refused, Appx. C, but the Court of Appeals stayed its mandate pending the filing of this Petition. Appx. D.

REASONS FOR GRANTING THE WRIT

1. The decision of the Third Circuit panel majority cannot be reconciled with this Court's 1978 decision in "United States v. United States Gypsum Co."

The trial court, sitting without a jury, relied on language from this Court's decisions in *United States v. Griffith*, 344 U.S. 100 (1948), *United States v. Patten*, 226 U.S. 525 (1913), and *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), in writing in support of the verdict:

> There is no need to show any specific intent to restrain trade if a conspiracy to fix prices is shown to exist in an industry, the very nature of which involves large shipments of coal from this District in Pennsylvania to other states. . . . In the *Patten* case it was said:
>
> '. . . the conspirators must be held to have intended the necessary and direct consequences of their acts, and cannot be heard to say the contrary. In other words, by purposely engaging in a conspiracy which necessarily and directly produces the result which the statute is designed to prevent, they are, in legal contemplation, chargeable with intending that result.'

> "Proof that there was a conspiracy, that its purpose was to raise prices, and that it caused or contributed to a price rise is proof of the actual consummation or execution of a conspiracy under §1 of the Sherman Act." U.S. v. Socony-Vacuum Oil Co., . . .

Appx. B, 458 F.Supp. at 893. This discussion was the bench trial equivalent of the court's jury instruction on the issue. *Cf. Jackson v. Virginia*, ___ U.S. ___, ___ n. 8 (June 28, 1979) (same appellate standard applies in reviewing application of law to facts after jury and nonjury trials).

a. "Gypsum" 's intent holding applies to all price-fixing cases.

The memorandum and verdict below were filed June 21, 1978, just a week before this Court ruled in *United States v. United States Gypsum Co.*, 438 U.S. 422, 435, that "intent is an element of a criminal antitrust offense." Thus, on appeal, *Gypsum* governed this case. *Hamling v. United States*, 418 U.S. 87, 102 (1974); *Bradley v. School Board*, 416 U.S. 696 (1974). The court of appeals acknowledged this rule, but the panel majority found justification for removing this case from the rule announced in *Gypsum*, which itself was a price-fixing case, in certain language from Part II.B. of the *Gypsum* decision. This Court's discussion showing that a *mens rea* requirement is especially appropriate in Sherman Act cases because of the "rule-of-reason" character of many of these prosecutions is, by the terms of the opinion itself, no more than "an array of considerations arguing against treating antitrust violations as strict liability crimes" given to "reinforce" the

fundamental holding of the case. 438 U.S. at 438. That fundamental holding, contained in Part II.A. of the Court's decision, is premised not on any special aspect of antitrust law, but rather on "the familiar proposition that '[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.' *Dennis v. United States*, 341, U.S. 494, 500 (1951)." 438 U.S. at 436. This Court's decision contains not a hint that any class of antitrust crimes is excluded from the holding. Rather, as the Chief Justice explicitly writes, "we conclude that the criminal *offenses* defined by the Sherman Act should be construed as having intent as an element." *Id.* at 443 (emphasis added). See also *id.* at 436 ("unwilling to construe the . . . Act as mandating *a regime* of strict liability offense*s*"), 438 ("antitrust violation*s* as strict-liability crime*s*").

Gypsum itself was a criminal price-fixing conspiracy case, indicted and tried on the same legal theory as this appeal. *See* this Court's descriptions, *id.* at 427, 434. It is true that chief among thirteen methods by which the prosecution in *Gypsum* sought to prove that those defendants had agreed "to fix , maintain and stabilize" prices was "interseller price verification," a practice which in and of itself is not *per se* illegal, *id.* at 441 n. 16. This Court's decision was not limited to such "controlling circumstance" cases, however. Rather, the Court expressly ruled on the broader basis that the *Gypsum* defendants were entitled to be acquitted unless proved to have undertaken action "with knowledge of its probable consequences," *id.* at 444, in a case such as that one and this in which a restraint on trade was actually shown. The rule argued for by the

majority below was rejected in *Gypsum*, for the panel decision would affirm simply on proof of voluntarily joining a conspiracy to fix prices, without a requirement of proof of knowledge of probable consequences.

The panel majority credits the trial court with having correctly announced "the principles set forth in cases for more than four decades." Appx. A, slip op. at 6, referring to 458 F.Supp. at 893. The majority then poses the question presented as whether the *Gypsum* holding "changed the long-established rule of law on price-fixing cases by requiring a more stringent burden of proof on the issue of intent." Appx. A, slip op. at 6. But the fact is that *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), did not establish any such rule as the district court found in it. Rather, the language quoted by the district court and below does not come from a discussion of any intent requirement, but rather from a refutation of the defendants' argument in that case that they were not guilty of criminal price-fixing because the prices they fixed were not absolutely rigid and stable, that they had inadequate economic power to control the market, or that the prices were fixed at levels which were not economically unreasonable. The broad language of the Court was employed in sweeping away these irrelevant arguments. *United States v. Patten*, 226 U.S. 525 (1913), also relied on by the district court, was a criminal prosecution for a conspiracy to "run a corner" on the cotton market. This Court employed not a *per se*, but a rule-of-reason analysis. Thus, the language from *Patten* stating that intent is conclusively presumed in antitrust cases, whatever else may be the weakness of that proposition (see discussion, Point 3 *infra*) was

necessarily overruled by *Gypsum*.*

The decision below creates a false distinction between this case, the theory of which is typical in many ways of criminal antitrust cases, and *Gypsum*, by describing the latter as not involving a *per se* offense. The panel majority's reasoning puts the rabbit in the hat by assuming there was no agreement in *Gypsum* to fix prices, but only to verify them. That was the issue for the jury there. If the Robinson-Patman defense had been put to the jury and disbelieved, the *Gypsum* defendants would have been guilty of a *per se*, not a rule-of-reason offense: price-fixing. So here, petitioner conceded that *others* in his industry and even in his company conspired to fix prices, but the factfinder should have permitted himself the freedom to ascertain what petitioner's intent was when he shrugged his shoulders or said "do whatever you think is right." Because the opinion below decided an important and recurring question of criminal antitrust law in a way which cannot be reconciled with this Court's decision in *Gypsum*, the writ of certiorari should be granted.

---

* For the proposition that intent could be conclusively presumed in antitrust cases, *Patten* relied on two earlier cases, *United States v. Reading Co.*, 226 U.S. 324, 370 (1912), and *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 243 (1899). Both of these cases involved civil actions. Likewise, *United States v. Griffith*, 334 U.S. 100 (1948), also relied on by the district court in this case, was a civil action, in which the Court said no more than that it is "not always necessary to find a specific intent to restrain trade." *Id.* at 105. A standard of liability in *criminal* antitrust cases is and was intended to be stricter and more difficult to prove than that in civil cases. *Gypsum*, 438 U.S. at 443 n. 19.

b. A conclusive presumption of intent in per se price-fixing criminal cases is unconstitutional.

Once it is accepted that *Gypsum* established intent as an element of this criminal offense, the panel majority can also be seen to have disregarded this Court's cases in its alternate holding that intent is "necessarily" present in price-fixing cases and the accused "cannot be heard to argue" that an element of the offense has not been proved. Appx. A, slip op. at 9. As the Court stated in reversing the *Gypsum* convictions:

> 'A conclusive presumption [of intent] which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense.' *Morissette* [*v. United States*], 342 U.S. [246], 275 [(1952)]. . . . Although an effect on prices may well support an inference that the defendant had knowledge of the probability of such a consequence at the time he acted, the jury must remain free to consider additional evidence before accepting or rejecting the inference.

438 U.S. at 446 (first interpolation original). Even if the court below could not conceive of a situation in which the factfinder would have a reasonable doubt on this issue in a price-fixing case, the difference between a criminal prosecution and mere civil liability requires that this issue continue to be treated as one of fact, not of law. *Cf. Dunn v. United States*, ___ U.S. ___ (June 4, 1979).

Indeed, to presume intent in this way, where intent is an element of a criminal offense, contravenes the Constitutional requirement that every element be proved beyond a reasonable doubt. *Sandstrom v.*

Montana, ___ U.S. ___ (June 18, 1979); *Patterson v. New York*, 432 U.S. 197, 215 (1977); *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

For this reason as well, the writ should be granted.

2. The federal circuits are divided on the application of this Court's "Gypsum" holding to price-fixing cases which do not focus on a "controlling circumstance" defense.

The conclusion of the panel majority below coincides with that of the Seventh Circuit in *United States v. Brighton Building & Maintenance Co.*, No. 77-2295 *et seq.* (decided May 18, 1979), slip op. at 4-9. On the other hand, in *United States v. Foley*, No. 78-5013 *et seq.* (decided April 19, 1979), the Fourth Circuit (while erroneously characterizing *Gypsum* as a rule-of-reason case) rejected the exemption of price-fixing cases from the *Gypsum* holding. The *Foley* court stated:

> *Gypsum* also involved a rule-of-reason offense rather than a per se violation of §1 such as the price-fixing here alleged. While the Court's analysis is in part dependent on the relative lack of notice provided by rule of reason offenses, the rule announced is framed in terms of all §1 criminal prosecutions.

Slip op. at 25 n. 13. (*Foley* went on to hold that the instructions given in that case met the *Gypsum* standard, and that even more favorable instructions were not required by virtue of that case's involving post-1974 felony violations, a conclusion it shares with the *Brighton Building* court, but not pertinent here.)

This Court should grant certiorari to resolve this difference among the circuits.

3. The reasoning of the concurring judge below cannot support the judgment, as it is inconsistent with this Court's decisions on whether an unconstitutional instruction on an element of the offense can constitute harmless error.

Judge Adams, in his concurring opinion below, contends that while under *Gypsum* intent *is* an element in a criminal price-fixing case, the error was neither plain nor harmful. Slip op. at 14-19. This approach also cannot be squared with governing precedent.

In *Pipefitters Local 562 v. United States*, 407 U.S. 385, 440-442 & n. 52 (1972), this Court held that a jury charge giving a fundamentally incorrect interpretation of an element of the crime charged constitutes plain error which can be considered on appeal under Fed.R.Crim.P. 52(b), even though no objection was made at trial. This rule is not a new one, nor is it applicable only in special circumstances or to a narrow class of offenses. See *Terminiello v. Chicago*, 337 U.S. 1, 5 (1949); *Screws v. United States*, 325 U.S. 91, 107 (1945) (opinion of Douglas, J., announcing judgment). That petitioner's trial counsel did not anticipate this Court's *Gypsum* ruling should not bar petitioner's claim now.

Nor could this error be called harmless. The government's theory of liability was petitioner's action in "permitt[ing his vice president for sales, Tomaine,] to continue attending the price-fixing meetings [and] authorizing Tomaine to issue the fixed price circulars in the name of the company . . ." Gov't's Post-Trial Mem. 14. The real issue throughout the proceeding was petitioner's knowledge and intent underlying this purely passive conduct. The question on appeal is not

whether under proper instructions the factfinder could "plausibly" have found no intent. *See* Appx. A, slip op. at 18. Rather, the appellate court is limited to determining, on the record before it—the district court's findings and discussion—whether the facts necessary to support a conviction were actually found under proper guiding rules. See *Henderson v. Kibbe*, 431 U.S. 145 (1977). No matter how easily the government might have carried its burden of proving petitioner's "rudimentary awareness of economic cause and effect," Appx. A, slip op. at 18, appellate speculation cannot carry the day where the trial record fails. *United Brotherhood of Carpenters v. United States*, 330 U.S. 395, 408-9 (1947); *Bollenbach v. United States*, 326 U.S. 607, 614-15 (1946).

As Judge McCree put it:

> We are not here concerned with an omission that constitutes a mere technical defect or with one that concerns the existence of an element that has been conceded by the defense or is otherwise not in issue. Instead, the omission in this case concerned the element that constitutes the very basis of the offense and the only element in issue. The only question . . . was whether proof of [the physical] facts was sufficient to establish beyond a reasonable doubt that appellant consciously associated himself with his [vice president's] venture, that he sought to make it succeed.

United States v. Bryant, 461 F.2d 912, 921 (6th Cir. 1972). It cannot be "harmless error for a [factfinder] to find a man guilty without even knowing what the elements of the offense are." *United States v. Howard*, 506 F.2d 1131, 1134 (2d Cir. 1974). *Cf. Sandstrom v. Montana, supra* (questioning whether unconstitutional jury instruction on an element of the crime can ever be harmless).

Accordingly, the rationale of the concurring opinion below provides no adequate basis on which to deny the writ. Rather, the writ should be granted to decide whether an unconstitutional jury instruction on an element of a criminal offense is both plain and prejudicial error.

4. This case presents the important and recurring issue arising out of this Court's 1962 "Wise" decision whether a corporate president's mere knowledge of and failure to prevent his subordinate's antitrust violations subject that president to personal criminal liability.

The decision below correctly identified *United States v. Wise*, 370 U.S. 405, 416 (1962), as setting forth the legal test of liability of a corporate officer under §1 of the Sherman Act:

> [W]e hold that a corporate officer is subject to prosecution under §1 of the Sherman Act whenever he knowingly participates in effecting the illegal contract, combination, or conspiracy—be he one who authorizes, orders, or helps perpetrate the crime . . .

Nevertheless, the opinion below seems to recognize that the limited items of evidence applicable to *this* petitioner's personal culpability all go to the issue of knowledge, while there is no evidence of actual *participation*. See Statement, *ante*. Thus, the panel sought to rely on petitioner's mere position with the company and a general fear that if actual participation were required, high corporate officials would go un-

punished. Appx. A, slip op. at 12, quoted *ante*. As stated by several Members of this Court, however:

> The ownership of a controlling or substantial interest in a company which conspires with others in violation of the antitrust laws does not in itself impose antitrust liability on the owner. . . . Rather, the owner must be shown to have *participated knowingly and actively* in the alleged illegal activity.

Local 189, Amalgamated Meat Cutters v. Jewel Tea Co. (UMWA v. Pennington), 381 U.S. 676, 734 (1965) (Goldberg, Harlan & Stewart, JJ., concurring) (citations omitted; emphasis added). As the Seventh Circuit put if in a leading criminal price-fixing case:

> The substantive law of trade conspiracies requires some consciousness of commitment to a common scheme. . . . It has been stated there is no such thing as an "unwilling conspirator." . . . Unless [each individual] involved understood from something that was said or done that [he] was, in fact, committed to raise prices, there was no violation of the Sherman Act.

United States v. Standard Oil Co., 316 F.2d 884, 890 (1963) (citations omitted).

Whatever may be the civil consequences of the facts as found against petitioner—and such consequences are not trivial—the panel's final justification for upholding the verdict will not do in a criminal context, where guilt is personal, standards high, and *participation* essential to culpability. Just as a corporate officer and part owner should not be insulated by his position, so, too, should he not be declared guilty of a crime without proof of his personal participation.

The writ should be granted to decide this important and recurring question: whether knowledge coupled with a failure to prevent a subordinate's antitrust violations renders a higher corporate official personally liable to criminal conviction under the Sherman Act.

CONCLUSION

The petition for certiorari should be granted, the judgment of the United States Court of Appeals for the Third Circuit reversed, and either a judgment of acquittal entered or a new trial granted.

Respectfully submitted,

CARROLL CREAMER
CARROLL & DUFFY

Attorneys for Thomas J. Gillen

By _____
J. SHANE CREAMER, ESQUIRE
PETER GOLDBERGER, ESQUIRE
326 Three Penn Center Plaza
Philadelphia, PA 19102
(215) 568-5200

DATED: July 12, 1979

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-2082

UNITED STATES OF AMERICA

v.

THOMAS J. GILLEN,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
(D.C. Crim. No. 77-00072-02)

Argued February 12, 1979

Before: ALDISERT, ADAMS and HIGGINBOTHAM,
Circuit Judges

(Opinion filed May 8, 1979)

J. SHANE CREAMER, (argued)
PETER GOLDBERGER,
CARROLL CREAMER CARROLL
& DUFFY
326 Three Penn Center
Plaza
Philadelphia, Pa. 19102
Attorney for Appellant

JOHN H. SHENEFIELD,
Assistant Attorney
General,
BARRY GROSSMAN,
DANIEL J. CONWAY, (argued)
Attorneys,
Department of Justice,
Washington, D.C.
20530

Of Counsel:

JOHN J. HUGHES,
WARREN MARCUS,
ROGER L. CURRIER,
Attorneys,
Department of Justice,
Philadelphia, Pa.

OPINION OF THE COURT

HIGGINBOTHAM, A. LEON, JR., *Circuit Judge*

The appellant, Thomas J. Gillen, was found guilty of conspiring to fix prices in violation of Section 1 of the Sherman Act. 15 U.S.C. § 1. He argues that the district court erred in not making specific findings on intent and that the evidence is insufficient to support the judgment of conviction. We disagree and affirm.

I.

Gillen was charged, along with James J. Tedesco, with conspiring to fix, stabilize and maintain prices of anthracite coal in unreasonable restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act from 1966 through 1973.[1] The companies named in the indictment were engaged in the mining, processing and marketing of anthracite coal and were among its major producers and sellers in the United States.[2] Substantial quantities of anthracite coal were sold and shipped to customers located outside of Pennsylvania.

From 1961 through November, 1973, the Anthracite Producers Advisory Board, composed of representatives of the major anthracite organizations, met monthly to consider and recommend the total anthracite production quota as provided in the federally authorized Production Control Plan for the Anthracite Industry. Four or five times a year, after adjournment of the Advisory Board meetings,

1. Tedesco pleaded nolo contendere. Six corporations and three individuals were also named in the indictment as co-conspirators: Blue Coal Corporation, Glen Burn Colliery, Inc., Greenwood Stripping Corporation, Lehigh-Navigation-Dodson Company, Lehigh Valley Coal Sales Company, Inc., Reading Anthracite Coal Company, William R. Dougan, Joseph A. Frank, and Carl J. Tomaine. Each of the companies and two of the individuals named in the indictment as co-conspirators pleaded nolo contendere in a related case. M.D. Pa. Crim. No. 76-149. The case against one of the individuals was dismissed because of his poor health.

2. Virtually all anthracite coal produced in the United States during the period in issue, 1961 through November, 1973, was mined and processed in Pennsylvania. It was estimated that total sales per year exceeded fifty million dollars.

the same company representatives who constituted the Advisory Board would discuss and reach tentative agreements on the prices each represented company would charge for the various sizes of coal for the ensuing months.[3] In addition, agreements were reached at these so-called "after meetings" on the timing of the price change as well as the company to initiate the change. After the tentative agreement was reached, the representatives would report to their superiors for their approval. When approved, as they generally were, anthracite price circulars were issued by the companies.[4] These circulars which were issued three or four times a year were price lists for the sale of coal to line dealers.[5] These line dealers were dealers who were not located in the immediate vicinity of the colliery and who generally received coal shipments by rail or truck.

Gillen became president of Blue Coal Corporation in 1967 and continued as such until late 1973. He was also a part owner of Blue Coal from 1966 until November 26, 1973. The government's chief witness, Carl Tomaine, was Blue Coal's vice president in charge of domestic and retail sales from 1968 through 1973. The court below found that Tomaine as sales representative for Blue Coal reported what occurred at the "after meetings" to Gillen, who was then president of the company. It found further that Gillen knew and approved of the actions of Tomaine in the agreements reached at these meetings. It concluded that Gillen

3. These "after meetings" were held a month or so prior to the time price circulars would be issued. No mention of these price discussions was ever made in the official minutes of the Advisory Board. These "after meetings" were not authorized by the Production Control Plan and were not part of the Advisory Board's function.

4. "In almost all instances all companies agreed to the same price." District Court Memorandum of Decision at 5-6. It was understood, however, that some of the prices printed by one or more of them could, at times, vary somewhat from the others if necessary to compensate for a peculiar market or inventory situation or other problems that a producing company might be encountering.

5. The circular represented the published price for the sizes of coal listed thereon, and the prices at which the companies actually sold it. At times, however, the companies sold above or below the circular price. When sales were made below the circular price, however, the circular price was used as the level from which discounts were determined.

was a knowing participant in the price-fixing conspiracy from 1966 to November 26, 1973. Gillen was sentenced to a suspended prison term of six months, a $35,000 fine and two years probation.

II.

A. Precepts of Law

With commendable vigor, Gillen's present counsel contends that "The district court erred in holding that intent is not an element of a criminal price-fixing conspiracy charge." The validity of appellant's argument depends on whether the United States Supreme Court in *United States v. United States Gypsum Co.*, 98 S. Ct. 2864 (1978) changed the law of more than four decades on proof of intent in a price-fixing conspiracy case. *Gypsum* was decided a week after the trial judge filed his Memorandum of Decision containing findings of fact and verdict of guilty.[6] We must nevertheless consider *Gypsum* because we must apply the law in effect as of the time we render this decision. *Bradley v. School Board of City of Richmond*, 416 U.S. 696 (1974).

In determining the applicability of *Gypsum* to the instant case we have within the "hierarchy of legal precepts" a situation where "the rule of law is clear and the sole question is application to the facts at bar." Aldisert, *Writing Judicial Opinions*, III-2 (1979) (unpublished manuscript) *See also* Aldisert, *The Judicial Process*, 59-71 (1976).

B. The Different Factual Situations

At issue in *Gypsum* was whether an exchange of price information for purposes of compliance with the Robinson-Patman Act, 15 U.S.C. § 13, was exempt from Sherman Act scrutiny. The defendants claimed that the purposes of these price exchanges were to permit them to take advantage of the "meeting competition" defense of Section 2(b)

6. On June 21, 1978, the trial judge filed his Memorandum finding Gillen guilty as charged. The Supreme Court decided *Gypsum* on June 29, 1978.

458 F. Supp. 887

of the Robinson-Patman Act and to prevent customer fraud. The government alleged that this system of interseller price verification had the effect of stabilizing the price of gypsum board in violation of section 1 of the Sherman Act. The Court concluded that interseller price verification could not be used to establish a good faith defense under Section 2(b) by sellers with "lying buyers."

Thus *Gypsum* was not a situation where the parties agreed that a certain price would be charged; at most the parties sought information on what price had been or was being charged with no agreement or request for information on the price a competitor would charge in the future. In contrast, we have parties in the instant case who met three or four times a year "to discuss the coal prices that would appear on the circulars" . . . and to "reach a tentative agreement concerning the prices to be charged by the companies. . . ." Memorandum, Findings of Fact and Verdict, p. 2.

C. The Precepts Announced By The Trial Court and the Supreme Court

The trial judge, relying on *United States v. Patten*, 226 U.S. 525 (1912) and *United States v. Griffith*, 334 U.S. 100 (1947), held:

> There is no need to show any specific intent to restrain trade if a conspiracy to fix prices is shown to exist in an industry, the very nature of which involves large shipments of coal from the District in Pennsylvania to other states. See U.S. v. Griffith, 334 U.S. 100, 105[,] 92 L. Ed. 1236, 1242 (1947); U.S. v. Patten, 226 U.S. 525, 543[,] 57 L. Ed. 333, 342 (1919). In the Patten case it was said:
>
> > ". . . [t]he conspirators must be held to have intended the necessary and direct consequences of their acts, and cannot be heard to say the contrary. In other words, by purposely engaging in a con-

> spiracy which necessarily and directly produces the result which the statute is designed to prevent, they are, in legal contemplation, chargeable with intending that result."
>
> "Proof that there was a conspiracy, that its purpose was to raise prices, and that it caused or contributed to a price rise is proof of the actual consummation or execution of a conspiracy under § 1 of the Sherman Act." *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 84 L. Ed. 1129 (1939) at 1166.

The above holding by the trial court stated the principles set forth in cases for more than four decades. Thus Judge Herman was merely following the traditional precepts long accepted in price-fixing cases, most notably in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) which he explicitly cited.

Appellant contends that, regardless of the prior law, the trial judge erred because the Supreme Court in *Gypsum*, speaking through Chief Justice Burger, announced a different principle of law when it stated:

> [A] defendant's state of mind or intent is an element of a criminal antitrust offense which must be established by evidence and inferences drawn therefrom and cannot be taken by the trier of fact through reliance on a legal presumption of wrongful intent from proof of an effect on prices.

98 S. Ct. at 2872.

Thus the ultimate issue is whether this language changed the long-established rule of law on price-fixing cases by requiring a more stringent burden of proof on the issue of intent.

Recognizing that the parameters of the conduct regulated by the Sherman Act may be at times elusive, we believe the Supreme Court's statement in *Gypsum* on intent was born out of a concern for borderline violations and was

not meant to modify past precedent on price-fixing conspiracies, for the Court stated:

> With certain exceptions for conduct regarded as *per se* illegal because of its unquestionably anticompetitive side effects, *see, e.g., United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 60 S. Ct. 811, 84 L. Ed. 1129, the behavior proscribed by the Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct. Indeed, the type of conduct charged in the indictment in this case—the exchange of price information among competitors—is illustrative in this regard. The imposition of criminal liability on a corporate official, or for that matter on a corporation directly, for engaging in such conduct which only *after the fact* is determined to violate the statute because of anticompetitive effects, without inquiring into the intent with which it was undertaken, holds out the distinct possibility of overdeterrence; salutary and procompetitive conduct lying close to the borderline of impermissible conduct might be shunned by businessmen who chose to be excessively cautious in the face of uncertainty regarding possible exposure to criminal punishment for even a good-faith error of judgment. (emphasis added)

Id. at 2875-76.

We submit that the Court did not intend any extraordinary change in the rules of law on price-fixing cases because by its very citation of *Socony-Vacuum* the court acknowledged that price-fixing cases are an exception. Moreover, price-fixing is clearly not "conduct which only *after the fact* is determined to violate the statute." *Id.*

Price-fixing is an area of the law in which people either can or ought to be able to predict the legal consequences of their actions. Price fixers do not even approach "the gray zone of socially acceptable and economically justifiable business conduct," 98 S. Ct. at 2875, for the Supreme Court

nearly forty years ago created a bright-line prohibition by declaring:

> Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference. Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive.
>
> . . . .
>
> Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se.

United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221, 223 (1940).

Thus in price-fixing conspiracies, where the conduct is illegal per se, no inquiry has to be made on the issue of intent beyond proof that one joined or formed the conspiracy. The conduct at issue in *Gypsum* concededly was of such a nature as to warrant a further inquiry into intent. The Supreme Court's concern with those who unwittingly violate antitrust laws has no place here. Here, defendants have fixed prices, "probably the clearest violation of the antitrust laws and the one most obnoxious to the underlying policy of free competition."[7] The act of agreeing to

7. Mid-west Paper Products v. Continental Group, Inc., Nos. 78-1736, 78-1746, 78-1776, 78-1796, slip op. at 44 (3d Cir. Mar. 26, 1979) (Higginbotham, J., dissenting).

The Supreme Court recently reemphasized:

> In construing and applying the Sherman Act's ban against contracts, conspiracies, and combinations in restraint of trade, the Court has held that certain agreements or practices are so "plainly anticompetitive,"

fix prices is in itself illegal; the criminal act is the agreement.

Moreover, even if read to apply here, *Gypsum* does not require a reversal because the intent requirements will always be met in a case involving a price-fixing conspiracy. If a defendant intends to fix prices, he necessarily intends to restrain trade. In *Gypsum*, the element lacking was a finding that the defendants knew that the exchanges of price information would have the probable effect of fixing or establishing prices. 98 S. Ct. at 2877. In defining the standard, the Court held that knowledge that the actions will result in restraining trade is enough. Here, where their actions were nothing less than price-fixing, the violators cannot be heard to argue that they did not know that their meetings and discussions of prices would result in an unreasonable restraint of trade.

Additionally, the mere existence of a price-fixing agreement establishes a defendant's illegal purpose. As the Court stated in *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1926), "The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition." Thus, the conscious object of every price-fixing conspiracy is an illegal act.

Unlike *Gypsum* where the defendants allegedly did not appreciate the consequences of their actions, here the law is clear and the conduct egregious. The conspirators met and set prices. They did not engage in any subtle or sophisticated scheme; their actions were in no way ambiguous. We agree that fairness requires caution in presuming intent from a mere effect on prices where the defendant's actions might reasonably be considered not to violate the antitrust laws. But where, as here, individuals have fixed

7. (Cont'd.)

National Society of Professional Engineers v. United States, 435 U.S. 679, 692 (1978); *Continental TV, Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 (1977), and so often "lack . . . any redeeming virtue." *Northern Pac. R. Co. v. United States*, 356 U.S. 1, 5 (1958), that they are conclusively presumed illegal without further examination under the rule of reason generally applied in Sherman Act cases.

Broadcast Music, Inc. v. CBS, Inc., 47 U.S.L.W. 4359, 4361 (Apr. 17, 1979).

prices in a most unequivocal and flagrant manner, questions of knowledge of probable consequences and indeed of "conscious object" appear clearly answered.

III.

A.

On review, we must determine whether there is substantial supportive evidence for the district court's findings on the ultimate factual question of guilt. *United States v. Delerme*, 457 F.2d 156, 160 (3d Cir. 1972). With respect to the elements of the crime, the Supreme Court has held "that a corporate officer is subject to prosecution under § 1 of the Sherman Act whenever he knowingly participates in effecting the illegal contract, combination, or conspiracy —be he one who authorizes, orders, or helps perpetrate the crime." *United States v. Wise*, 370 U.S. 405, 416 (1962). As a result, we must determine whether there is substantial evidence of knowing participation by Gillen in the price-fixing conspiracy. Our review of the evidence satisfies us that substantial supportive evidence of such knowing participation exists.

First, it is undisputed that a price-fixing conspiracy existed. Second, we think that there is substantial evidence to support the district court's finding that Gillen knew of the conspiracy. Tomaine, sales representative for Blue Coal, reported to Gillen what occurred at the "after meetings" keeping Gillen abreast of coal pricing.[8] Tomaine testified that he informed Gillen that at the "after meetings" they had "agreed to go along on certain prices."[9]

Finally, with regard to Gillen's participation in the conspiracy, Joseph J. Fauzio, President of the Greenwood Stripping Company, and one of the unindicted co-conspirators, testified that:

> Q. On the occasion of the Anthracite Committee meetings, Mr. Fauzio, do you recall any discussion on the occasion of such meetings either before, during or after with regard to the topic of price circulars?
>
> A. The only discussion would be in a social atmosphere, whereas, someone would make the statement that it's about time that the boys get together and start thinking about the circular. This was done, to my knowledge, it had been mentioned by Mr. Tedesco, Mr. Ulmer, Mr. Gillen and myself.
>
> Q. What is the full name of Mr. Gillen that you are referring to?
>
> A. Mr. Tom Gillen.

Transcript 41-42.

Additional evidence of direct involvement by Gillen is the testimony of several witnesses regarding a meeting in the

8. By Mr. Currier:
Q. From 1966 to the end of 1973, to your knowledge did Blue Coal ever issue a circular without your attending one of these meetings?
A. Not that I can recall.
Q. Did you inform anyone at Blue Coal about these price meetings?
A. Yes.
Q. Who was that?
A. Well, if Mr. Gillen was available, I spoke to him about it.
Q. When did you begin telling him of these meetings?
A. I would just have to assume sometime after he became President.
Q. For how long thereafter did you talk to him about these meetings?
A. Throughout 1973 whenever he was available I would talk to him about it.
Q. I didn't understand your answer, sir.
A. Throughout 1973 whenever he was available I would talk to him about it, yes.
Q. Did you speak to him in years prior to that about it?
A. Yes.
Q. What would you tell Mr. Gillen during these discussions?
A. The proposed price increase or decrease.
Transcript 379-380.

9. [By the Court]
Q. Did you ever explain to him that you were up there agreeing on prices?
A. I explained to him that we were up there discussing prices and what we were going to do for the coming circular whether there was an increase or decrease.
Q. You told them you were discussing prices?
A. And we agreed to go along on certain prices, yes, sir.
Q. And you told them that you were—these were the prices that you were going to charge at Blue Coal?
A. Yes, sir.
Transcript 468.

winter of 1966-1967 at Brutico's Restaurant, Old Forge, Pennsylvania. The meeting was attended by owners, producers and sales representatives who agreed to re-establish price stability by attempting closer adherence to the circular price. Gillen was present and actively participated in criticizing the sales people for their price cutting activities.[10]

Furthermore, as president of the company, Gillen was in a position to order the price-fixing halted, but did not do so. When a company president has knowledge that his company is involved in a price-fixing conspiracy and takes no action to stop it, he may not insulate himself from liability by leaving the actual execution of the scheme to his subordinates. *See United States v. Wise*, 370 U.S. 405 (1962). If this were not the rule, the highest corporate officers would, in effect, be beyond the reach of the antitrust laws even when their companies are actively engaged in price-fixing.

B.

For the first time on appeal, Gillen pointed to an apparent ambiguity in the transcript with respect to testimony relied on by the Government in support of an affirmance:

> Q. Did you ever explain to him that you were up there agreeing on prices?
>
> A. I explained to him that we were up there discussing prices and what we were going to do for the coming circular whether there was an increase or decrease.
>
> Q. You told *them* you were discussing prices?

10. Gillen contended that this was merely a "social gathering" during which concerned coal executives met to advocate a stabilization of a depressed industry. The government characterized the meeting as a mechanism for shoring up deviations from the price stability promoted by the circular "after meetings." After having been exposed to these conflicting scenarios, Judge Herman was apparently persuaded that the Brutico meeting was an indication that Gillen was a participant in the overall conspiracy. (*See* Appendix at 58; Memorandum Decision at 12). Several witnesses described the nature of the meeting and testified that Gillen attended.

> A. And we agreed to go along on certain prices, yes, sir.
>
> Q. And you told *them* that you were—these were the prices that you were going to charge at Blue Coal?
>
> A. Yes, sir.

Transcript 468 (emphasis added).

Defendant argues that the references to "them" make the testimony too vague and unclear to support a finding of knowledge of the conspiracy. Alternatively, counsel for Gillen urged at oral argument a remand to clear up the record on this point. We disagree. First, the trial judge in fact considered the matter during closing argument concluding that "It doesn't say to him but it's implied," and "I don't believe I said them, I was intending to say did you tell him."[11] It seems clear from the context, and Judge Herman so indicated, that the witness understood what was meant. Second, despite the discussion of this matter by the trial judge and government counsel, Gillen's trial counsel did not object to the trial judge's determination of the question and alluded to it only in passing in his brief on appeal. It is not this Court's practice to allow arguments of this nature to be raised on appeal if they were not pressed below. *See United States v. Dansker*, 537 F.2d 40, 64 (3d Cir. 1976).

C.

Finally, we find Gillen's argument of withdrawal totally without merit. He argues that he began removing himself in 1972 from Blue Coal except for labor negotiations and his efforts to sell the company. From this he argues that the government was required to prove his continuous participation in the conspiracy by introducing evidence of continued overt acts. The burden is, however, on the defendant to prove "[a]ffirmative acts inconsistent with the object of the conspiracy and communicated in a manner

11. Transcript of Proceedings on Argument at 8-11.

reasonably calculated to reach co-conspirators." *United States v. United States Gypsum Co.*, 98 S. Ct. at 2887; *United States v. Heckman*, 479 F.2d 726, 729 (3d Cir. 1973). In addition, Tomaine testified that he continued to inform Gillen of the price-fixing meetings until the business was sold in late 1973.[12]

For these reasons, the judgment of sentence will be affirmed.

ADAMS, *Circuit Judge* concurring.

I concur in the judgment of this Court and join in parts I and III of the Court's opinion. However, because the majority's discussion regarding the issue whether intent must be shown in a price-fixing case diverges from my understanding of the present state of the law on this important subject, I have undertaken a separate statement.

Specifically, the majority appears to adhere to the position that intent is not a necessary element in establishing a price-fixing violation under § 1 of the Sherman Act. Rather, the majority asserts that "the Supreme Court's statement in [*United States v. United States Gypsum Co.*, 98 S. Ct. 2864 (1978)] on intent was born out of a concern for borderline violations and was not meant to modify past precedent on price-fixing conspiracies."[1] In my view, this stance cannot be squared with the explicit conclusion arrived at in *Gypsum*: "The criminal offenses defined by the Sherman Act should be construed as including intent as an element."[2] This conclusion by the Supreme Court was specifically grounded on its "unwilling[ness] to construe the Sherman Act as mandating a regime of strict liability criminal offenses."[3]

12. Transcript, *supra*, note 8.

1. Typed opinion at 6-7.

2. 98 S. Ct. at 2876 (footnote omitted).

3. *Id.* at 2872-73 (footnote omitted).

Accordingly, whereas under the majority's approach a defendant who is prosecuted for participating in a price-fixing conspiracy or in any other combination that constitutes a *per se* violation of the Act would not be entitled to a jury charge on intent, I regard such an instruction, when requested, to be mandatory after *Gypsum*. However, in Gillen's case it appears that the failure of the trial judge—who sat without a jury and operated without the benefit of the *Gypsum* pronouncement—to make an explicit determination regarding intent did "not affect the substantial rights of" Gillen.[4] Therefore, I join the majority in its affirmance of the judgment of the district court.

As I understand the *Gypsum* opinion, it instructs that whether the criminal offense charged under section 1 of the Sherman Act is a *per se* violation or whether at the other end of the spectrum it approaches "the gray zone of socially acceptable and economically justifiable business conduct,"[5] the government must meet its burden of establishing intent. *Gypsum* declares that the prosecution may meet this responsibility under one of two standards. If a defendant is charged with engaging in illegal conduct the anticompetitive effects of which did not come to fruition, *Gypsum* directs that an "elevated standard of intent" must be satisfied before criminal liability may be imposed—namely, that the defendant had the specific intent or conscious purpose to produce the anticompetitive consequences.[6] On the other hand, if anticompetitive effects actually resulted from the defendant's actions, the government need prove only that the defendant had knowledge of the probable consequences of his acts.[7] Moreover, in establishing knowledge, the government, under the guidelines set forth in *Gypsum*, may not rely on a presumption that a

4. *See* 28 U.S.C. § 2111 (harmless error rule). Also, inasmuch as no plain error was committed by the district judge, reversal would not appear to be warranted since no request was made at trial for a determination regarding intent. *See* note 22 and accompanying text *infra*.

5. 98 S. Ct. at 2875.

6. *Id.* at 2877 n.21.

7. *Id.*

defendant intends the necessary and direct consequences of his acts, although an anticompetitive effect "may well support an inference that the defendant had knowledge of the probability of such a consequence at the time he acted."[8]

In sum, the Supreme Court held in *Gypsum* "that a defendant's state of mind or intent is an element of a criminal antitrust offense which must be established by evidence and inferences drawn therefrom and cannot be taken from the trier of fact through reliance on a legal presumption of wrongful intent from proof of an effect on prices."[9] Contrary to the majority's reading of *Gypsum,* these two aspects of the holding appear to have clarified an unsettled area of law and to have overruled prior precedent that had developed in the wake of *United States v. Patten,* 226 U.S. 525 (1913). The Supreme Court stated in that early case, which reversed the dismissal of a criminal indictment:

> And that there is no allegation of a specific intent to restrain such trade or commerce does not make against this conclusion (sic), for, as is shown by prior decisions of this court, the conspirators must be held to have intended the necessary and direct consequences of their acts and cannot be heard to say the contrary. In other words, by purposely engaging in a conspiracy which necessarily and directly produces the result which the statute is designed to prevent, they are, in legal contemplation, chargeable with intending that result.[10]

Patten had been regarded, first, as negating a requirement of specific intent in criminal antitrust cases;[11] indeed, it had been thought, as the district court's jury charge in *Gypsum* attests, that no intent whatsoever need be established in criminal antitrust cases when it is shown that the

8. *Id.* at 2878.

9. *Id.* at 2872.

10. 226 U.S. at 543.

11. *See, e.g.,* United States v. Champion Int'l Corp., 557 F.2d 1270, 1274 (9th Cir.), *cert. denied,* 434 U.S. 938 (1977).

defendant's conduct had anticompetitive effects.[12] *Patten* has also been cited for the proposition that it may be conclusively presumed that a defendant intends the necessary and direct consequences of his acts.[13] Neither of these interpretations of *Patten* would appear to survive *Gypsum* intact. The first—that proof of specific intent is not required—now applies only to cases where anticompetitive effects have been demonstrated. The second—that a defendant may be conclusively presumed to intend the necessary consequences of his acts—has been discarded altogether.[14]

Turning to the present case, it appears that there was no need for the prosecution to establish that Gillen had a conscious purpose to achieve anticompetitive results—the level of intent required in cases where anticompetitive effects cannot be shown. Rather, it was sufficient for the government to demonstrate that Gillen knew that the price-fixing conspiracy would produce such effects. This is so because the district court found that Gillen and the other parties named in the indictment knowingly entered into a conspiracy to fix prices, whereby the prices contained in the corporate defendants' price lists during the years 1966-73 were set by agreement among competitors.[15] Such a price-fixing arrangement is a *per se* violation of the Sherman Act, which means that there necessarily are anticompetitive effects, since the *per se* characterization is reserved for those combinations "which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable."[16] And, inasmuch as an ongoing price-fixing scheme spanning at least seven years was found to exist rather than an incipient conspiracy that had not yet borne fruit, it cannot be said

12. *See Gypsum, supra,* 98 S. Ct. at 2872.

13. *See, e.g.,* United States v. Hilton Hotels Corp., 467 F.2d 1000, 1002 (9th Cir. 1972), *cert. denied,* 409 U.S. 1125 (1973).

14. *See* Handler, *Antitrust—1978,* 78 Colum. L. Rev. 1363, 1399 (1978).

15. *See* United States v. Gillen, Crim. No. 77-72-2, typed opinion at 5-9 (M.D. Pa., June 21, 1978) (memorandum).

16. Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

that the anticompetitive effects "did not [yet] come to pass" so as to necessitate the establishment by the government of the "elevated standard of intent."[17]

The Supreme Court has narrowly circumscribed the situations in which a fact-finder may reasonably conclude that a defendant lacked the requisite knowledge to support criminal liability for violating section 1 of the Sherman Act. Under the Court's teaching in *Gypsum*, all that is demanded for purposes of satisfying the knowledge requirement is that the defendant have a rudimentary awareness of economic cause and effect, and therefore "that the defendant had knowledge of the probability of . . . [the anticompetitive] consequence at the time he acted."[18] Thus the government need not prove that the defendant knew that the effects of the conduct or the conduct itself were proscribed, since mistake or ignorance of the law is no defense.[19] Nor is it generally essential under this lesser intent standard that the prosecution prove that the defendant engaged in the illegal conduct with an improper purpose in mind.[20]

Where, as here, the conspirators have been found to have met systematically and periodically for at least seven years to fix prices, it is not fairly plausible that they did not know that they were tampering with the supply and demand curve of the competitive market. To paraphrase the Supreme Court, "[t]he business behavior which [gave] rise to criminal antitrust charges [here] is conscious behavior normally undertaken only after full consideration of the costs, benefits and risks."[21] Accordingly, I cannot say on the record before us that the omission by the trial

17. *See Gypsum, supra,* 98 S. Ct. at 2877 n.21.

18. 98 S. Ct. at 2878.

19. *See The Supreme Court, 1977 Term,* 92 Harv. L. Rev. 1, 297-98 (1978).

20. *See* 98 S. Ct. at 2879 n.23.

21. *Gypsum, supra,* 98 S. Ct. at 2878. In this respect, the conduct involved here is to be distinguished from the exchange of price information that marked *Gypsum,* where it may well be doubted whether the defendants knew that anticompetitive consequences could be expected to flow from their activity. *See id.* at 2875 & n.16. *See also* Handler, *supra* note 14, at 1399-1400.

judge of a specific finding that the defendants knew that their conduct would produce anticompetitive results affected the substantial rights of Gillen so as to warrant a reversal, particularly where such a finding was not requested.[22] Therefore, I concur in the judgment of the Court.

22. *See* note 4 *supra.* Gillen's defense, which was predicated in large measure on the assertion that he had no knowledge of, and never authorized or ratified the price-fixing agreements entered into by Tomaine, his company's sales representative, addressed the different question whether Gillen knowingly joined the conspiracy. As the Supreme Court explained in *Gypsum,* "[i]n a conspiracy, two different types of intent are generally required—the basic intent to agree, which is necessary to establish the existence of the conspiracy, and the more traditional intent to effectuate the object of the conspiracy. *See* LaFave and Scott, Criminal Law 464-465 (1972). Our discussion here focuses only on the second type of intent." 98 S. Ct. at 2876 n.20. With respect to the first type of intent—whether the defendants in this case intended to agree upon a conspiratorial course of conduct, the district court determined both that a conspiracy was knowingly formed and that Gillen was a knowing participant. The trial judge also held that there was no need for the government to prove specific intent to restrain trade, a holding that properly reflects the law even after *Gypsum.* Typed opinion of the district court at 9-13.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

(A.O. U. S. Courts, International Printing Co., Phila., Pa.)

APPENDIX B

458 F. Supp. 887
UNITED STATES of America
v.
Thomas J. GILLEN
Crim. No. 77-72-2.

United States District Court,
M.D. Pennsylvania.

June 21, 1978.

John Hughes, Roger L. Currier, and Warren Marcus, Philadelphia, Pa., for the United States Goverment.

Bernard J. Brown, Carbondale, Pa., for defendants.

MEMORANDUM

HERMAN, District Judge.

The Defendant, Thomas J. Gillen, along with James J. Tedesco, was charged with engaging in a conspiracy to fix, stabilize and maintain prices of anthracite coal in unreasonable restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act. (15 U.S.C. 1). Gillen elected to be tried by the Court without a jury and the trial began on January 3, 1978 and continued through January 10.

By the first of March the parties' briefs and suggested findings had been filed, oral argument was then had

and the case is now ripe for decision.

From the record the Court makes the following.

FINDINGS OF FACT

1. The term "circulars" as used by the representatives of anthracite coal companies: Blue Coal Corporation; Lehigh Navigation-Dodson Company; Lehigh Valley Coal Sales Company, Inc, Susquehanna Coal Company and Glen Burn Colliery, Inc., means the price lists for the sale of anthracite coal to line dealers, the dealers who are not located in the immediate vicinity of the colliery and who are generally shipped coal by rail or truck, many of whom are located in states other than Pennsylvania.

2. During the period between 1961 through November of 1973, Blue Coal Corporation;[1] Lehigh Navigation-Dodson Company; Glen Burn Colliery, Inc. Susquehanna Coal Company and Reading Anthracite Coal Company issued such circulars three or four times a year. (Exhibits G-217 through 625.)

3. Prior to the issuance of the circulars, sales representatives, including Carl J. Tomaine for Blue Coal Corporation, (after 1968); Charles W. Dilley for Lehigh Navigation-Dodson Company; Joseph A. Frank for Lehigh Valley Coal Sales Company, Inc.; Eugene J. Bourger for Susquehanna Coal Company and later for Glen Burn Colliery, Inc., and William R. Dougan for Reading Anthracite Coal Company met together in the Middle District of Pennsylvania to

1. Prior to 1966, Blue Coal was Glen Alden.

discuss the coal prices that would appear on the circulars. N.T. 33, 34, 39, 119, 120, 209-211, 289-294, 374-379.

4. During such meetings the sales representatives would reach a tentative agreement concerning the prices to be charged by the companies they represented for the various sizes of coal as reported on the circulars; and concerning the issuance of such circulars; the date of issue; effective date, and which company would first issue its circular. N.T. 39, 120, 209, 210, 291, 377.

5. After such meetings the sales representatives reported to their superiors who approved the agreements and then generally, communicating with each other by telephone, the said representatives confirmed the agreement. N.T. 39, 40, 212, 215, 218, 380, 381.

6. Tomaine, sales representative for Blue Coal Corporation, generally during the period from 1968 through 1973 reported what occurred at these meetings to his superior Thomas J. Gillen, the President of the Company. N.T. 374-379.

7. Thomas J. Gillen, Defendant, knew and approved of the actions of Tomaine in the agreements reached at these meetings. N.T. 41, 42, 381.

8. Tomaine by telephone on occasion later confirmed with the others the agreement that had been tentatively reached at the meetings. N.T. 217.

9. Following the said telephone communications between the sales representatives described above, the anthracite companies including Blue Coal would issue circulars conforming to the agreements. N.T. 120-124; 212, 213, 217, 295; 378-382; G.Ex. 212 et seq.; particularly 422, 428, 434, 438, 443, 449, 455, 461, 467, 474, 480, 487, 494.

10. In the winter of 1966-1967 a meeting was held at Brutico's Restaurant, Old Forge, Pennsylvania, attended by about 15 persons including the Defendant, Thomas J. Gillen, Tomaine, Dilley, Bourger, Dougan, Frank, as well as James Tedesco, President of Lehigh Valley Coal Sales Company, Inc., Ivor Williams, the President of Blue Coal Corporation and William Moore, President of Susquehanna Coal Company. N.T. 125-127; 42-44; 268-270; 598.

11. At the meeting at Brutico's the parties agreed to try to get a better price for their coal, something near the circular price. N.T. 45, 128, 129, 130, 271.

12. The Defendant, Thomas J. Gillen, was part owner of Blue Coal Corporation, a co-conspirator, from 1966 until November 26, 1973 and was President and Chief Executive Officer of the company from 1968 until November 26, 1973. N.T. 496, 497, 500, 501, 551.

13. The Defendant, as President and Chief Executive Officer of Blue Coal Corporation, had "overall authority" over all departments of the company. N.T. 560.

14. The said Defendant, as President and Chief Executive Officer of the Blue Coal Corporation had, at all times pertinent to the issues here, the final pricing authority for the sale of coal by the company. N.T. 619.

15. The said Defendant, as President and Chief Executive Office of the Blue Coal Corporation, did in fact participate with Carl Tomaine in making pricing decisions in the sale of coal by Blue Coal Corporation during the time pertinent to the issues here. N.T. 564-566. Coal was sold by Blue Coal to line dealers generally at the prices quoted in the circulars. N.T. 150, 190.

16. Prior to the meetings of the sales representatives described in Finding of Fact No. 3, at meetings of the Anthracite Committee on occasion Gillen, Fauzio and other coal producers suggested that the sales representatives of the various companies should get together and begin thinking about the circulars. N.T. 41, 42.

17. During each year from 1968 through October 1973, Blue Coal Corporation sold and shipped from Pennsylvania to line dealers located outside of Pennsylvania substantial quantities of anthracite coal in a continuous and uninterrupted flow of interstate commerce. N.T. 7.

18. During each year from 1968 through October 1973 Lehigh Valley Coal Sales Company, Inc., Glen Burn Colliery, Inc. and Lehigh Navigation-Dodson Company, also sold and shipped from Pennsylvania to line dealers located outside of Pennsylvania substantial quantities of anthracite coal. N.T. 184-187 and 229; 93; 267-268.

19. Circulars issued as herein described were mailed from the Middle District of Pennsylvania to line dealers in states other than Pennsylvania. These circulars contained the prices at which the anthracite coal was sold to said dealers. N.T. 97; 192-193.

DISCUSSION

[1] There are three elements that must be established by the Goverment before the Defendant can be found guilty of the offense charged. It must be established, first that there was a conspiracy, second that the conspiracy unreasonably restrained interstate com-

merce and finally that the Defendant was a member of that conspiracy.[2]

[2] The evidence establishes a conspiracy among the major anthracite coal companies in north eastern Pennsylvania, including Blue Coal Corporation, to fix, stabilize and maintain the prices of anthracite coal at least for the period between 1966 and 1973.

A brief history of the operation of the conspiracy follows.

Virtually all anthracite coal produced in the United States during the period in issue here was mined and processed in Pennsylvania. It was estimated that total sales per year was in excess of 50 million dollars. This coal is marketed in sizes ranging from the largest egg through stove, pea, buckwheat, rice to barley, the smallest. Most sizes may be used for home heating and many also are used by commercial and industrial establishments.

During all or part of the period covered by the indictment executives of the major anthracite organizations met monthly as the Anthracite Producers Advisory Board to consider and recommend the total anthracite production quota as provided in the federally authorized Production Control Plan for the Anthracite Industry. Four or five times a year, at the conclusion of the meeting of the Advisory Board, the

2. Section 1 of the Sherman Act, as it existed at the time of the occurrence of the facts here in issue provided in pertinent part:

"Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several states . . . is declared to be illegal . . . Every person who shall make any contract or engage in any combination or conspiracy declared . . . to be illegal shall be deemed guilty of a misdemeanor. . . ."

parties in attendance discussed prices reaching tentative agreements on the price each company represented would charge for the various sizes of coal for the ensuing months. In almost all instances all companies agreed to the same price.

Representatives of Blue Coal Corporation, Glen Burn Colliery, Inc., Greenwood Stripping Corporation, Lehigh Navigation-Dodson Company, Lehigh Valley Coal Sales Company, Inc. and Reading Anthracite Coal Company were generally those who participated in these "after meetings". These companies, as well as William R. Dougan for Reading Anthracite Coal Company, Joseph A. Frank for Lehigh Valley Coal Sales Company and Carl J. Tomaine for Blue Coal were named in the indictment as co-conspirators.[3]

The tentative agreements on price were then taken up with the superiors of the persons in attendance at the "after meetings" and when confirmed, as they generally were, anthracite price circulars were issued by the various companies.

These anthracite price circulars are cards or letters printed by the co-conspirator companies which set forth, among other things, published prices of various sizes of anthracite coal. These circulars were issued at various times during a year to certain customers for the purpose of advising them of price changes. A sub-

3. All of those named as co-conspirators except William R. Dougan, against whom the indictment was dismissed because of his health, previously entered pleas of nolle contendere to an indictment in this District charging the same conspiracy at Criminal No. 76-149.

James J. Tedesco, President of Lehigh Valley Coal Sales Company, Inc., a co-defendant in the instant case also pled nolle contendere.

stantial portion of these customers are coal dealers located outside of Pennsylvania.

Traditionally, and for many years during the period covered by the indictment, the price circulars issued in the spring of each year reduced the published prices as an inducement for dealers to purchase coal in the off-season. Thereafter, usually beginning in about June or July, the published prices of anthracite were increased in three or four stages to cover the spring reduction and to raise prices generally during the burning season.

The sessions which occurred after Advisory Board meetings generally were held a month or so prior to the time circulars would be issued. At these sessions, the conspirators present reached agreement on the price levels which would be listed by their respective companies in the forthcoming circulars. It was understood by the men at the meetings that some of the prices printed by one or more of them could, at times, vary somewhat from the others if that were necessary to compensate for a peculiar market or inventory situation or other problems which a producing company might be encountering. In addition, agreement was reached as to the timing of the circular price change as well as the company which would initiate the change.

These pricing discussions were held prior to the issuance of every price circular and no mention of them was ever made in the official minutes of the Advisory Board. The price discussions were not authorized by the Production Control Plan and were no part of the Advisory Board's function.

Following these "after meetings" some of the members of the Advisory Board would inform their superiors of the nature and content of the price

discussions. At times, after their superiors had been consulted, certain Advisory Board members would then telephone other conspirators to verify that their companies would issue price circulars in accordance with the agreement reached at the "after meeting".

Carl J. Tomaine, named as an unindicted co-conspirator in paragraph 2 of the indictment, was Vice President for Domestic and Retail Sales for Blue Coal Corporation from approximately 1966 to May 1974. During at least that period of time and during each of those years he was Blue Coal's only representative at Advisory Board meetings and represented Blue Coal in the price-fixing meetings which followed certain Advisory Board meetings.

While the circular represented the published price for the sizes of anthracite coal listed thereon, and the price at which the companies, including Blue Coal, actually sold the coal, it did not *always* represent the actual selling price. At times, the conspirators sold above the circular price. At other times, they sold below the circular price. When sales were made below the circular price, however, the circular price was used as the level from which discounts were determined.

During one period of particularly heavy discounting, in the winter of 1966-1967, a meeting was held by the representatives of anthracite companies at Brutico's Restaurant in Old Forge, Pennsylvania. Defendant Gillen was present at this meeting. Discussion at the meeting, in which Gillen participated, centered on the need to discontinue discounting from circular price and the need to generally raise the selling price of anthracite for all producer companies. Following general agree-

ment on these aims at the meeting, discounting gradually began to abate and selling prices began to come more in line with the agreed upon circular prices.

The circulars from all companies showing the similarity in price for each company were received into evidence as was the handwritten tabulation of the circular prices for 1967 through 1973 for all six major anthracite companies. This tabulation (G. 204-210) was kept by Charles. W. Dilley, of Lehigh Navigation - Dodson Company as he testified at page 296 N.T.:

> "(A) These are a record of the prices, all the major anthracite producing companies and they are from my own file, my own deskfile in my handwriting. And they list the prices of each of the companies that published a circular in the year 1967 through the year 1973. These were made up by me and they were made up, each entry as to what a company's price was at a certain time was entered by me when their price circular was received and in hand."

[3] While the evidence in a conspiracy case need not show an express or formal agreement or that the members by words spoken or written stated between themselves what their objective or purpose was to be or the details thereof, or the means by which the object or purpose was to be accomplished, *U.S. v. Paramount Pictures*, 334 U.S. 131, 142, 68 S.Ct. 915, 92 L. Ed. 1260 (1948), the evidence in this case is overwhelming that a conspiracy was indeed knowingly formed and that the six corporate co-conspirators as well as Frank and Tomaine were members of it. See *Nash v. U.S.*, 229 U.S. 373, 378, 33 S.Ct. 780, 782, 57 L. Ed. 1232, 1236 (1912) where Justice Homes stated ". . . the Sherman

Act punishes the conspiracies, at which it is aimed on the common-law footing,—that is to say, it does not make the doing of any act other than the act of conspiring a condition of liability." See also *U.S. v. Paramount Pictures Inc.*, 334 U.S. 131, 142, 68 S.Ct. 915, 92 L. Ed. 1260 (1948).

In *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 465, 41 S.Ct. 172, 176, 65 L. Ed. 349, 356 (1920) in speaking of the Sherman Act after quoting that part of Section 1 of the Act applicable to the illegality of conspiracy thereunder, goes on to say:

> "The accepted definition of a conspiracy is, a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means."

See also *U.S. v. Perlstein*, 126 F.2d 789 (3d Cir. 1942).

[4] There is no need to show any specific intent to restrain trade if a conspiracy to fix prices is shown to exist in an industry, the very nature of which involves large shipments of coal from this District in Pennsylvania to other states. See *U.S. v. Griffith*, 334 U.S. 100, 105, 68 S.Ct. 941, 944, 92 L.Ed. 1236, 1242 (1947); *U.S. v. Patten*, 226 U.S. 525, 543, 33 S.Ct. 141, 145, 57 L.Ed. 333, 342 (1912). In the *Patten* case it was said:

> ". . . the conspirators must be held to have intended the necessary and direct consequences of their acts, and cannot be heard to say the contrary. In other words, by purposely engaging in a conspiracy which necessarily and directly produces the result which the statute is designed to prevent, they are, in legal contemplation, chargeable with intending that result."

[5] "Proof that there was a conspiracy, that its purpose was to raise prices, and that it caused or contributed to a price rise is proof of the actual consummation or execution of a conspiracy under §1 of the Sherman Act." *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150 at 219, 60 S.Ct. 811 at 842, 84 L.Ed. 1129 at 1166 (1939).

[6] "And the amount of interstate or foreign trade involved is not material (*W.W. Montague & Co. v. Lowrey*, 193 U.S. 38, 24 S.Ct. 307, 48 L.Ed. 608) since §1 of the Act brands as illegal the character of the restraint not the amount of commerce affected. *Steers v. U.S.* (C.C.A. 6th) 192 F. 1, 5; *Patterson v. U.S.* (C.C.A. 6th) 222 F. 599, 618, 619." Footnote 59, *Socony-Vacuum Oil Co.*

We come now to consider the last part of §1 of the Act (fn. 1 supra) to determine whether or not the Defendant was a member of the conspiracy as charged in the indictment. We conclude that he was.

The Defendant acknowledges in his brief that "There seems to be little doubt that the sales people conspired . . ." but argues that *he* did not "knowingly and intentionally participate in the conspiracy". He further testified that during his entire life in the coal business he was a production man and not familiar with the selling phase of the business. He testified that Tomaine, his sales representative at the price-fixing meetings, had full authority to determine at what price Blue Coal would sell the various grades of coal and that he, Tomaine, never told him (the Defendant) that at these meetings the persons attending agreed to "fix" the coal prices. He further argues that he did not know that the persons at the meetings had so agreed and that he never

became a party to the conspiracy. We can agree with the Defendant as argued in his brief that the testimony of accomplices should be viewed with suspicion but we do not believe that Tomaine had an "ax to grind" in testifying as he did at page 468 N.T. and we conclude that his credibility was good.

Q. Did you ever explain to him [the Defendant] that you were up there *agreeing* on prices?

A. I explained to him that we were up there *discussing* prices and what we were going to do for the coming circular whether there was an increase or decrease.

Q. You told them you were *discussing* prices?

A. And we *agreed* to go along on certain prices, yes, sir.

Q. And you told them that you were—these were the prices that you were going to charge at Blue Coal?

A. Yes, sir." (emphasis added)

[7] We can agree with the Defendant that before he can be found guilty of the conspiracy charged in the indictment it must be shown beyond a reasonable doubt that he knew of the existence of the conspiracy and that he knowingly participated in it. *U.S. v. Griffith*, supra; *U.S. v. Champion International Corp.*, 557 F.2d 1270 (9th Cir. 1977) but the Government need not show any specific intent under the Sherman Act, *U.S. v. Patten*, supra.

[8] The knowledge of the Defendant, and his participation in the conspiracy need not be shown by direct evidence, although it seems to the Court that direct evidence here does establish beyond a reasonable

doubt such knowledge and participation, but circumstantial evidence would be sufficient to convict.

The testimony of Tomaine that from 1968 through 1973 he regularly attended the "after meetings"; (corroborated by the others attending the "after meetings") that whenever Defendant was available he discussed these meetings with him telling him of the proposed price increases or decreases of all the companies; that Defendant would say "do whatever you think is right or shrug his shoulders", is strong indication that Defendant knew for some years of the existence of the conspiracy and participated in it.

The testimony concerning the meeting at Brutico's (Findings 10 & 11) at which Defendant was an active participant discussed earlier herein is further indication that he took an active part in the conspiracy. Indeed, the Defendant acknowledged that Tomaine told him that prices were *discussed* at the "after meetings" and that the members were going to take some action thereon, but he argues that Tomaine never told him that they had *agreed* to *fix* the prices. *Socony Oil*, supra, holds that prices are fixed when they are agreed upon.

The circumstantial evidence also points strongly to the fact that the Defendant was a knowing participant. The conspiracy was formed as early as 1961 but for our purposes here it continued from 1966-1967,[4] and from 1968 through 1973 Blue Coals' Vice President in Charge of Domestic Sales, Tomaine, attended the

4. In 1966 Defendant, while not President of Blue Coal, had a substantial stock interest in the company and attended Brutico's meetings as one of the owners.

meetings regularly, conferred with the Defendant on a regular basis. Defendant was during this period the executive officer of the company and admittedly had the final say on pricing and he authorized Tomaine to issue the price circulars.

[9] A corporate officer is subject to prosecution under Section 1 of the Sherman Act if he authorizes or helps in the perpetration of the crime. *U.S. v. Wise*, 370 U.S. 405, 82 S.Ct. 1354, 8 L.Ed.2d 590 (1962).

[10] We have considered all of the testimony and the exhibits, have assessed the credibility of all the witnesses, the character and reputation evidence put in by stipulation and after considering all of these matters we have arrived at the following.

CONCLUSIONS OF LAW

1. Beginning as early as 1961 and continuing through November 1973, there existed a conspiracy in the Middle District of Pennsylvania to fix, stabilize and maintain prices of anthracite coal as alleged in the indictment.

2. Blue Coal Corporation, Glen Burn Colliery, Inc., Greenwood Stripping Corporation, Lehigh Navigation-Dodson Company, Lehigh Valley Coal Sales Company, Inc., Reading Anthracite Coal Company, William R. Dougan, Joseph A. Frank, Carl J. Tomaine and James J. Tedesco were co-conspirators in the conspiracy charged in the indictment.

3. This conspiracy unreasonably restrained interstate commerce.

4. This conspiracy was carried out in part within the Middle District of Pennsylvania.

5. The Defendant was a knowing participant in the conspiracy from 1966 to November 26, 1973.

6. The Defendant is guilty of the offense charged in the indictment.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 78-2082

UNITED STATES OF AMERICA

v.

THOMAS J. GILLEN,

Appellant

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge,* ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH and HIGGINBOTHAM, *Circuit Judges.*

The petition for rehearing filed by Thomas J. Gillen, appellant

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Higginbotham

Dated: June 12, 1979 Circuit Judge

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 78-2082

UNITED STATES OF AMERICA

vs.

GILLEN, THOMAS J.,

Appellant

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until July 12, 1979.

/s/ Higginbotham

Circuit Judge

Dated: June 22, 1979

Supreme Court, U. S.
FILED
SEP 5 1979
MICHAEL RODAK, JR., CLERK

No. 79-58

In the Supreme Court of the United States

OCTOBER TERM, 1978

THOMAS J. GILLEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

JOHN H. SHENEFIELD
Assistant Attorney General

JOHN J. POWERS, III
DANIEL J. CONWAY
Attorneys
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-58

THOMAS J. GILLEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 599 F. 2d 541. The opinion of the district court (Pet. App. 1b-16b) is reported at 458 F. Supp. 887.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 1979. A timely petition for rehearing was denied on June 12, 1979 (Pet. App. 1c). The petition for a writ of certiorari was filed on July 12, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the intent requirement in a criminal prosecution under Section 1 of the Sherman Act is satisfied by proof that petitioner knowingly authorized his company's participation in a conspiracy to fix prices.

2. Whether the evidence is sufficient to show that petitioner participated in the price-fixing conspiracy.

STATEMENT

1. Following a trial to the court in the United States District Court for the Middle District of Pennsylvania, petitioner, president and part owner of Blue Coal Corporation, was convicted of violating Section 1 of the Sherman Act, 15 U.S.C. 1, by conspiring to fix the price of anthracite coal sold to line-dealers.[1] Upon petitioner's conviction, the court imposed a six-month suspended sentence, a two-year term of probation with a special condition of community service, and a $35,000 fine (Pet. 4; Pet. App. 4a).[2]

The conspiracy began as early as 1961 and continued until the end of 1973 (Pet. App. 15b). It was conducted in part through representatives of the coal companies who met periodically to discuss and fix the line-dealer prices (*id.* at 2b-3b). At these meetings, the representatives would reach a tentative agreement on the prices to be charged, the effective date for price changes, the date on which the new prices would be announced, and the company that would take the lead in making the new prices public (*ibid.*). Petitioner's company was represented at the meetings by Carl Tomaine, its Vice President in charge of domestic and retail sales (*id.* at 2b-3b, 9b).

---

[1]Blue Coal Corporation was engaged in the business of mining, processing and selling anthracite coal. The coal was sold in separately priced sizes to various kinds of dealers. Line-dealers are those who are not based in the vicinity of the coal production facilities and thus transport the purchased coal by truck or rail to their own storage facilities (Pet. App. 2b). The prices charged to line-dealers were contained in price "circulars" issued by sellers three to four times per year (*ibid.*).

[2]The Sherman Act was amended in 1974 to make violations of Section 1 a felony. Petitioner was indicted for a violation occuring prior to the 1974 amendments and therefore was charged with a misdemeanor.

After reaching a tentative agreement, the representatives reported to their superiors for final approval (Pet. App. 2b-3b). As its president, petitioner had final authority to determine the prices charged by Blue Coal (*id.* at 4b). Accordingly, Tomaine conferred with petitioner concerning circular price changes, and he informed petitioner of what had been discussed at the meetings and the prices that had been agreed upon (*id.* at 10a-11a, 3b, 13b-15b). Petitioner knew and approved of the actions of Tomaine in the agreements reached at the meetings (*id.* at 3b).

On receiving clearance from their superiors, the representatives, including Tomaine, would confirm the original agreement by telephone (Pet. App. 3b). After confirmation, the companies would issue their line-dealer circulars in conformity with the agreement (*ibid.*).[3] Generally, the companies adhered to the agreed-on prices (*id.* at 4b, 9b).[4]

2. The district court, sitting as the trier of fact, found that petitioner knew of the conspiracy, expressed his approval of it at meetings with other producers, and agreed to adhere to it (Pet. App. 3b-5b, 13b-14b). It further found that petitioner authorized Tomaine to commit Blue Coal to the pricing agreements (*id.* at 14b-

---

[3]Occasionally, the circulars contained minor variations when necessary to compensate for peculiar market or inventory situations (Pet. App. 8b).

[4]Sometimes the companies deviated from the agreed-on prices (Pet. App. 9b). At one point during the conspiracy, price discounting became particularly heavy and necessitated a special meeting of the companies (*id.* at 9b-10b). At this so-called Brutico's meeting—named after the restaurant in which it was held—all those attending, including petitioner, committed themselves to raising the price (*id.* at 4b, 9b-10b). The meeting was successful and prices were increased to be more in line with the agreed-upon circular prices (*id.* at 10b).

15b). The court thus concluded that petitioner was a knowing participant in the conspiracy (*id.* at 13b, 16b). The court rejected petitioner's contention that the government was required to prove a specific intent to restrain trade, holding that petitioner's knowing participation in a conspiracy to fix prices was sufficient to establish the intent element of the Sherman Act (*id.* at 11b-12b).

3. The court of appeals affirmed. It determined that there was sufficient evidence to support the district court's finding that petitioner knowingly participated in the conspiracy (Pet. App. 10a-12a). Moreover, analyzing this Court's recent decision in *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978), the court of appeals held that in a criminal prosecution for the *per se* offense of price fixing under Section 1 of the Sherman Act, the *Gypsum* intent requirement is necessarily satisfied by the government's proof of the defendant's knowing participation in a conspiracy to fix prices (*id.* at 4a-10a).

ARGUMENT

The finding of the courts below that petitioner knowingly participated in a conspiracy to fix prices is sufficient to meet the intent requirement expressed in *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978). The decision of the court of appeals is therefore correct, and it is consistent with the decisions of the other courts of appeals that have interpreted *Gypsum*. Accordingly, review by this Court is unwarranted.

1. Petitioner contends (Pet. 9-12) that the court of appeals ignored this Court's holding in *Gypsum* that intent is an element of the offense in criminal prosecutions under the Sherman Act.

In *Gypsum*, this Court held that in a criminal prosecution for violation of Section 1 of the Sherman

Act, the government must prove (1) that the defendant acted with the purpose of producing an anticompetitive effect, or (2) that, in cases in which an anticompetitive effect resulted from the defendant's conduct, the defendant acted with the knowledge that such an effect probably would occur (438 U.S. at 444-445 & n.21, 446). Rather than ignoring this holding, the court of appeals recognized that in criminal cases involving a *per se* violation of Section 1 of the Sherman Act, this intent element is established by evidence that a defendant knowingly participated in a conspiracy to commit the *per se* offense (Pet. App. 4a-10a).

This holding is completely consistent with *Gypsum*. *Gypsum* involved price verification, a business practice that, unlike the price fixing charged in the present case, does not constitute a *per se* violation of the Sherman Act. In *Gypsum*, the intent requirement served to prevent the Sherman Act from establishing criminal liability for equivocal business activity that is in "the gray zone of socially acceptable and economically justifiable business conduct" and that only "after the fact is determined to violate the statute * * *" (438 U.S. at 441).

The Court's concern in *Gypsum* regarding "overdeterrence [of] salutary and procompetitive conduct lying close to the borderline of impermissible conduct" (438 U.S. at 441) has no bearing here, for this case does not involve equivocal or potentially procompetitive business conduct. Rather, petitioner was convicted of price fixing, a *per se* violation of the Sherman Act. Such offenses are so inherently anticompetitive that no inquiry need be made into the actual effects of the conspiracy or the possible beneficial motives of the defendant.[5]

---

[5]See, *e.g.*, *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States* v. *Trenton Potteries Co.*, 273 U.S. 392 (1927); *Addyston Pipe & Steel Co.* v. *United States*, 175 U.S. 211 (1899).

In holding that intent is an element of a Sherman Act criminal prosecution, the Court in *Gypsum* expressly noted the *per se* illegality of certain conduct with unquestionably anticompetitive effects (438 U.S. at 440-441), and nothing in the opinion suggests that the Court intended to abandon the *per se* rule in criminal cases. Under the *per se* rule, proof that a defendant intended to engage in price fixing is tantamount to proving not only that he knew that his conduct was anticompetitive, but also that he had the purpose of imposing its anticompetitive effects on the marketplace.[6] Thus, as the court of appeals in this case recognized, the purpose to produce anticompetitive effects is established by evidence of a defendant's knowing participation in a conspiracy to commit a *per se* violation of the Sherman Act. "[T]he conscious object of every price-fixing conspiracy is an illegal act. * * * [W]here, as here, individuals have fixed prices in a most unequivocal and flagrant manner, questions of knowledge of probable consequences and indeed of 'conscious object' appear clearly answered" (Pet. App. 9a-10a). The reason for the *per se* rule is in part to avoid any necessity to inquire behind the fact of the agreement to do something deemed overwhelmingly likely to be harmful to competition.[7] Therefore, the court of appeals correctly held that the evidence of petitioner's

[6]As one commentor has noted, "it is inconceivable that those who engage in conduct so pernicious that it is 'conclusively presumed to be unreasonable' would not know the probable effects of their actions." Handler, *Antitrust—1978*, 78 Colum. L. Rev. 1363, 1399-1400 (1978) (footnotes omitted).

[7]In other words, to argue that *Gypsum* requires proof beyond the intent knowingly to participate in the price-fixing conspiracy is to argue that *Gypsum* abandoned the *per se* rule in criminal cases. But, as discussed above, *Gypsum* evinces the Court's continued adherence to, rather than its disavowal of, the *per se* rule.

knowing participation in a price-fixing consipracy sufficed to establish the intent element of the offense.[8]

2. Petitioner's contention that a conclusive presumption of intent in criminal price-fixing cases is unconstitutional (Pet. 13-14) is beside the mark. The court of appeals did not establish a conclusive presumption of intent in *per se* cases. Rather, it merely applied the *per se* rule to the facts of this case to conclude that the government had proven every essential element of the offense beyond a reasonable doubt.

Unlike the situations before this Court in *Gypsum* and in *Sandstrom* v. *Montana*, No. 78-5384 (June 18, 1979), the government was not relieved of its burden of proving the intent element of the offense beyond a reasonable doubt. The *per se* rule is a substantive principle of law that defines the elements of the offense, not an evidentiary presumption that requires the jury to make prescribed inferences relating the facts adduced at trial to the elements of the offense. The *per se* rule does not make the defendant's purpose irrelevant. Rather, it applies only if the trier of fact first finds that a defendant has knowingly conspired to engage in conduct constituting a *per se*

[8]Contrary to pettitioner's contention (Pet. 14), there is no conflict in the circuits on the application of *Gypsum* to cases involving *per se* violations of the Sherman Act. See *United States* v. *Continental Group, Inc.*, No. 78-2328, 3d Cir. Jul. 20, 1979); *United States* v. *Foley*, 598 F. 2d 1323 (4th Cir. 1979), pets. for cert. pending, Nos. 78-1737, 78-1838, 79-93; *United States* v. *Brighton Building & Maintenance Co.*, 598 F. 2d 1101 (7th Cir. 1979), pets. for cert. pending, Nos. 78-1872, 79-111. The Fourth Circuit's statement in *Foley* that intent is an element in all Section 1 criminal prosecutions (598 F. 2d at 1335 n.13) is not inconsistent with the decision in this case, for the court below held that the requisite intent under *Gypsum* is established by proof of the defendant's knowing participation in a price-fixing conspiracy (Pet. App. 8a, 9a).

violation of the Sherman Act.[9] Under these circumstances, the *per se* rule holds that no further inquiry need be made. "It is as if the Sherman Act read: 'An agreement among competitors to [fix prices] is illegal.' " *United States* v. *Brighton Building & Maintenance Co.*, *supra*, 598 F. 2d at 1106. The *per se* rule thus does not establish an unconstitutional presumption regarding intent; instead, it serves to render unnecessary any further inquiry, once the government has proven beyond a reasonable doubt that the defendant intended to engage in conduct deemed illegal.

3. Petitioner's final contention is that there was no evidence of his participation in the conspiracy and that he was found guilty merely because of his position with Blue Coal (Pet. 17-19). This is a routine assertion of factual error, and "review would be of no importance save to the litigants themselves." *Rudolph* v. *United States*, 370 U.S. 269, 270 (1962).

In any event, petitioner's contention ignores the evidence in the record relied on by the courts below. For example, petitioner at times suggested that the conspirators begin working on the price lists (Pet. App. 11a, 5b). In addition, at the Brutico's meeting, petitioner committed his company to stricter adherence to the circular prices (see note 4, *supra*; Pet. App. 12a, 4b). Moreover, petitioner was continually informed of the price agreements and approved them (*id.* at 12a-13a, 3b).

[9]The instruction at issue in *Gypsum* directed the jury to presume that the defendants had an unlawful intent if it found that their conduct produced anticompetitive effects. This " 'effects alone' test" made defendants' purpose irrelevant, thus converting the criminal provisions of the Sherman Act into "strict-liability" offenses (438 U.S. at 435-436).

This evidence is more than sufficient to establish petitioner's knowing participation in the conspiracy.[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JOHN H. SHENEFIELD
Assistant Attorney General

JOHN J. POWERS, III
DANIEL J. CONWAY
Attorneys

SEPTEMBER 1979

[10]The court of appeals also observed that a company president who knows that his company is engaged in price fixing but fails to stop it "may not insulate himself from liability by leaving the actual execution of the scheme to his subordinates" (Pet. App. 12a). In this case, petitioner's involvement in the conspiracy went beyond his knowledge of it and his failure to stop it. Rather, as noted above, he directly participated.

DOJ-1979-08